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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,
Petitioners,

vs.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and THE CITY OF ST. LOUIS,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS THOMAS A. VILLA, BOARD OF ALDERMEN OF THE CITY OF ST. LOUIS, AND THE CITY OF ST. LOUIS

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Respondents Thomas A. Villa, Board of Aldermen of the City of St. Louis, and The City of St. Louis respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 999 F.2d 1301 (1993).

JURISDICTION

As petitioner states, the court of appeals denied petitioners' petition for rehearing on November 1, 1993. On January 25, 1994 Justice Blackmun signed an order extending to February 15, 1994 the time in which to file a petition for writ of certiorari. Then petitioner Sharon Tyus, but not the other petitioners,[1] filed an Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, which application was granted on February 8, 1994, extending the time to and including March 1, 1994. Thereafter the petition now under consideration was filed. The Court has jurisdiction of the petition, insofar as it was filed by Sharon Tyus, but it does not have jurisdiction over the claims of her co-petitioners - Freeman Bosley, Sr., Bertha Mitchell, Irving Clay, Jr., and Claude Taylor - because the time expired for the filing of a petition by any of them.

STATEMENT OF THE CASE

In January, 1992 the African American Voting Rights Legal Defense Fund, Inc., a black citizens' organization, and 16 black voters in the City of St. Louis filed suit in the United States District Court for the Eastern District of Missouri against Thomas A. Villa, President of the Board of Aldermen of the City of St. Louis, Vincent C. Schoemehl, Mayor of the City of St. Louis, and the Board of Aldermen, City of St. Louis. Plaintiffs attacked the recently approved ordinance of the City that had redistricted the City's twenty-eight wards. Plaintiffs alleged that the Board of Aldermen had been presented with a plan that would have drawn 14 wards with a 65% black majority, but had rejected that plan in favor of a plan with only 12 wards with a 65% black majority, and that the plan thus violated section 2 of the Voting

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[1] The application that was granted on January 25, 1994 was not served on respondents, and thus respondents do not know who joined in that application.

Rights Act, the Fourteenth Amendment, and other constitutional provisions (9, 11, 14-15).[2]

The City of St. Louis intervened as a defendant, and, in due course, the defendants answered. Admitting that there had been some acts of private and public discrimination in the City's long history (22), that wards could have been drawn in such a way that there would have been 14 wards with a majority black population (*id.*), and admitting that voting in the City, and within some wards, had, on some occasions, been racially polarized (22-23), defendants denied plaintiffs' allegations that, if the wards had been redistricted fairly and without discriminatory affect, blacks would constitute an effective voting majority in at least 14 wards (10, 21), and that the purpose of the redistricting plan was to abridge the right of blacks to vote (*id.*). They also plead that section 2 is unconstitutional if construed as plaintiffs urged (23-24).

Defendants then moved for summary judgment. They established, by affidavit, that the white population of the City is 50.9% of the total population (43), that the black population is 47.5% of the total population (*id*), that the white voting age population is 55.8% of the total voting age population (*id.*), that the black voting age population was 42.7% of the total voting age population (*id.*), and that the 1991 redistricting plan "will elect" 12 black aldermen (35). This is proportional representation, measured by voting age (32, 53). They further established that there had been rough proportional representation of black voters by voting age since at least 1971 (33-35).

Plaintiffs' response controverted none of these facts (84-94). Indeed, their expert complained that blacks had been packed into 12 wards (86, 88), agreed that blacks have an effective voting majority in wards when the total population is 65% black or the

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[2] References are to the appendix to appellants' brief in the Eighth Circuit.

voting age population is 60% black (87), asserted that it is possible to draw wards in such a way that there would be 14 wards with a 65% black majority (89), and argued that proportional representation should be assessed by total population, not by voting age population (90-91).

On June 17, 1992 the court entered summary judgment in favor of the defendants. The district court found that the redistricting plan provided for 12 wards in which black voters "should be able" to elect representatives of their choice, found that this constituted proportional voting age population representation, found that there had been such representation since at least 1971, and noted that plaintiffs failed to point to any special circumstances that would demonstrate that this success does not accurately reflect the ability of blacks to elect their preferred representatives. Petition for Writ of Certiorari, B-8. Plaintiffs then filed a motion to alter or amend the judgment (142), together with an affidavit in support (142, 213).[3] The district court, finding it inappropriate to reconsider the judgment based on an amended factual record since the plaintiffs had failed to show any reason why the evidence there presented could not have been produced at an earlier time, Petition for Writ of Certiorari, C-3, overruled the motion. *Id.*, C-4.

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[3] Many of the citations to the record contained in petitioners' petition are to this rejected post-judgment affidavit (159-213), not to the summary judgment record (1-94). Other citations purport to be from the summary judgment record, but find no support there or anywhere else. In an effort to abide by the command of Rule 15.3 that a brief in opposition be as short as possible, with a belief that the many distortions in the petition do not have a bearing on what would properly be before the Court if certiorari should be granted, see Rule 15.1, and with an expectation that the Court will readily notice the vast discrepancy in the case described by petitioners and that described by the district court in its judgment and post-judgment order, respondents have decided not to expose each misrepresentation. Lest there be any misunderstanding, however, respondents do not concede the truth of any of the "facts" set forth in the statement of the case, the argument, or any other section of the petition for writ of certiorari.

Five of the 17 plaintiffs appealed to the Eighth Circuit, which affirmed the district court's well-reasoned memorandum. *Id.*, A-3. A petition for rehearing was denied, as well as a suggestion for rehearing en banc. *Id.*

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS, WHO ARE NOT RESIDENTS OF THE WARDS WHERE THEY CLAIM THAT THERE IS VOTE DILUTION, DO NOT HAVE STANDING TO PRESENT THAT CLAIM.

Petitioners (and others) brought suit alleging that blacks in the City of St. Louis have less opportunity to elect representatives of their choice than do whites. This is, on its face, an incredible proposition: two-thirds of the City's city-wide elected municipal officials are black, including the City's mayor,[4] and for several decades the City's board of aldermen has had black members in rough proportion to the voting age population of the City that is black. But the plaintiffs believed that the Voting Rights Act requires that ward boundaries be gerrymandered to establish the maximum number of black controlled wards, and the boundaries were not. (32-36).[5] The district court found that the summary judgment record confirmed what intuition suggests, and the court concluded, as had a three-judge panel that had recently considered the question of whether blacks have an opportunity equal to that of whites to elect state legislators in the City of St. Louis, see *Nash v. Blunt*, 797 F.Supp. 1488 (W.D. Mo. 1992), affirmed *sub. nom. African American Voting Rights Legal Defense Fund, Inc. v. Blunt*, 113 S.Ct. 1809, 123 L.Ed.2d 441 (1993), that blacks do have an opportunity equal to that of whites to elect representatives of their choice in the City of St. Louis. When some of the plaintiffs appealed, the judgment was af-

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[4]The City of St. Louis has three city-wide elected municipal officials. The mayor and the comptroller are black; the president of the board of aldermen is white.

[5]Plaintiffs plead that there could have been more black dominated wards than there are; thus the Voting Rights Act was violated (14-15).

firmed by the Eighth Circuit. Now the petitioners petition this Court for a writ of certiorari.

Petitioners have now identified certain wards where they claim that black voters lack an equal opportunity to elect representatives of their choice: the 2nd, 6th, 7th, 8th, 17th, and 25th wards. Petition for Writ of Certiorari, pp 18-19. With respect to the 2nd Ward, this claim is inconsistent with their position in the district court, where their expert characterized the 2nd Ward as a black ward (89), and, indeed, complained that black voters had been "packed" into that ward (88). But, in any event, the only persons who have standing to claim that the votes of black voters in the 2nd, 6th, 7th, 8th, 17th, and 28th wards have been unlawfully diluted are, of course, black voters in the 2nd, 6th, 7th, 8th, 17th, and 28th wards. But Sharon Tyus, the only petitioner who has filed a timely petition, is a voter in the 20th Ward (4). As for her out-of-time co-petitioners, Freeman Bosley, Sr. is a voter in the 3rd Ward (3), Bertha Mitchell is a voter in the 4th Ward (*id.*), Irving Clay, Jr. is a voter in the 26th Ward (4), and Claude Taylor is a voter in the 27th Ward (*id.*). Thus they lack standing, and it is not likely that the Court will reach the questions presented by their petition.

II.

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISIONS BELOW AND THIS COURT'S DECISIONS IN *GINGLES* AND *VOINOVICH*.

Petitioners first argue that the decisions below conflict with this Court's decisions in *Thornburg v. Gingles*, 478 U.S. 30, 92 L.Ed.2d 25, 106 S.Ct. 2137 (1986) and *Voinovich v. Quiller*, 507 U.S. ___, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993), and therefore this Court should grant their petition. But they do not, so the Court should not.

It takes a little work to ascertain why petitioners think that the decisions below conflict with *Gingles*, but it appears to be this: petitioners think that the courts below regard *Gingles* as making proportional representation an absolute bar, Petition for Writ of Certiorari, p. 9, while *Gingles* actually recognizes that special circumstances can relax that bar. *Id.*, pp. 11-12. But, in fact, the courts below explicitly recognized that special circumstances could rebut the presumption arising from the history of proportional representation, noting that plaintiffs had failed to point to any such circumstance. *Id.*, B-8. So there is no conflict with *Gingles*.

It also takes a little work to understand why petitioners think that the decisions below conflict with *Voinovich*, but it appears to be this: petitioners think that *Voinovich* regards "packing," that is, placing more voters of a particular race in a district than are necessary to control the district, and "cracking," that is, placing significant numbers of voters of a particular race in a district that they are unable to control, as unlawful vote dilution. This is a misunderstanding of *Voinovich*. In fact, what the Court said is that "[i]n the context of single-member districts, the usual *device* for diluting minority voting power is the manipulation of district lines." *Voinovich*, 122 L.Ed.2d at 511 (emphasis added). The Court went on and described cracking and packing as the two most prominent techniques for manipulating district lines. *Id.* But the Court nowhere defined cracking or packing as vote dilution per se rather than as devices for achieving that dilution. Just a moment of reflection shows why.

If one cannot place more voters of a particular race in a district than are needed to control the district, and if one cannot place fewer voters of a particular race than are needed to control the district, then one must place the optimum number of voters of that race in every district. If, for example, 60% of the voting age population of a district gives voters of a particular race control of a district, then, to avoid the twin evils of packing and cracking,

the districts must all be drawn in such a way that each district contains the optimum 60% level. It is not possible that the law requires that.

First, in each such district, voters of other races will necessarily be cracked - there will be significant numbers of voters of other races, but they will be unable to elect representatives of their choice. Therefore, the notion that cracking is, per se, vote dilution is self-contradictory. The fact is that some voters will always be packed and that some voters will always be cracked. The present case is a case in point.

There are significant populations of white voters in the 2nd, 5th and 19th wards (56), all of which are "safe" black wards. So the white voters in those wards have been cracked. Whites are also subject to packing. If the experts on both sides are right, and it takes 60% voting age population for black voters to control a ward, a ward will be controlled by white voters if white voters make up 45% of a ward's voting population. Thus, giving a safety margin of 5%, packing of white voters occurs when wards are given a white voting age population of more than 50%. By that criterion, white voters are packed in sixteen wards (56). By the same logic, packing of black voters occurs when more than 70% of the voting age population is black. By that criterion, black voters are packed in only ten wards (*id.*) If packing and cracking are per se vote dilution, it is white voters, no less than black voters, who have had their votes diluted. And it makes no sense to say that everybody's votes have been diluted.

Second, drawing districts in such a way as to avoid packing or cracking of voters of a particular race necessarily means that voters of that race will control the maximum number of wards that their numbers permit. But the Court has already held that the Constitution does not permit districts to be gerrymandered to provide a racial minority with proportional representation. *Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d 511, 113 S.Ct. 216 (1993).

If the Constitution cannot allow that, it cannot allow a gerrymander to provide a race with the maximum number of districts, an even more ambitious claim.

III.

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISIONS BELOW AND THIS COURT'S DECISIONS IN *CITY OF RICHMOND V. UNITED STATES* AND *SHAW V. RENO.*

In the second section of their argument petitioners say that the decision below is inconsistent with the Court's decisions in *City of Richmond v. United States*, 422 U.S. 35, 45 L.Ed.2d 1, 95 S.Ct. 2091 (1975) and *Shaw v. Reno*, *supra*, and with unidentified circuit court of appeals' decisions. The idea seems to be that not only can a section 2 claim be based on effect without intent, such a claim may also be based on intent without effect. It would be odd if petitioners were right about this: if a prejudiced jurisdiction adopted a voting device with the expectation that the defect would adversely affect one race, but, in practice, it adversely affected the other race, why would one enjoin the device at the behest of a member of the race that derived the benefit of that device? It would be no different than a hypothetical case where a bigoted employer adopted an entry-level test that he expected disproportionate numbers of green people to fail, and did so for the purpose of excluding green people from employment with his business. If the employer miscalculated, and non-greens ended up failing the test in disproportionate numbers, with the result that non-greens, not greens, were excluded from employment, there is no reason why such a test should be held to have unlawfully discriminated against greens, despite the bad motive.

Not surprisingly, it is hard to find cases discussing petitioners' theory. Closest, perhaps, is *Hunter v. Underwood*, 471 U.S. 222, 85 L.Ed.2d 222, 105 S.Ct. 1916 (1985), a Fourteenth Amend-

ment voting rights case, where the Court held that a voting restriction, initially adopted with an illicit purpose, was invalid because "its original enactment was motivated by a desire to discriminate against blacks on account of race *and the section continues to this day to have that effect.*" *Id.*, 471 U.S. at 233 (emphasis added). Since then, district courts have relied on *Hunter* for the proposition that section 2 of the Voting Rights Act requires an effect, whatever the purpose. *Brown v. Board of Commissioners of the City of Chattanooga, Tennessee*, 722 F.Supp. 380, 389 (E.D. Tenn. 1989); *Dillard v. Baldwin County Board of Education*, 686 F.Supp. 1459, 1467 (M.D. Ala. 1988).

There is nothing in either *Richmond* or *Shaw* to the contrary. *Richmond* was a section 5 case, not a section 2 case. This is critical because section 5 explicitly requires, in determinations made pursuant to that section, that changes in the voting practices regulated by that section be determined not to have the illicit purpose *and* that they be determined not to have the illicit effect, while section 2 says nothing of the sort. Compare 42 U.S.C. §1973c with 42 U.S.C. §1973. Therefore *Richmond* lends no support at all to petitioners' claim. Quite the contrary is true.

Neither does *Shaw*. *Shaw* was concerned with the limited, extreme case where a redistricting scheme is so bizarre, so irrational on its face that it can only be understood as an effort to segregate voters into separate voting districts because of their race, without justification. *Shaw v. Reno, supra*, 125 L.Ed.2d at 536. Here petitioners admit that the City's redistricting plan does not come under the *Shaw* standard. Petition for Writ of Certiorari, p. 24. So the opinion below cannot be inconsistent with the decision in *Shaw*. Indeed, there is language in *Shaw* that contradicts petitioners' theory: *Shaw* describes voting practices as violating the Fourteenth Amendment "when they are adopted with a discriminatory purpose *and have the effect of diluting minority voting strength.*" *Shaw*, 125 L.Ed.2d at 524 (emphasis added).

IV

THE PETITION SHOULD BE DENIED BECAUSE THE CLAIMED SPLIT BETWEEN DISTRICT COURTS DOES NOT JUSTIFY GRANTING A WRIT OF CERTIORARI.

In the third part of their argument petitioners assert that the Court should grant certiorari to decide whether proportionality should be determined on the basis of voting age population or upon the basis of total population, an issue on which the "lower courts" are split. But all of the lower courts that petitioners point to as courts that have rejected voting age proportionality in favor of total population proportionality are district courts, not courts of appeals, and it is conflicts between courts of appeals, not a district court and a court of appeals, that are appropriate for certiorari. See Supreme Court Rule 10. Moreover, at least one of the cases petitioners cite as a case that uses total population also uses voting age population. See *Barnett v. Daley*, 835 F.Supp. 1063, 1067 (N.D. Ill. 1993); 809 F.Supp. 1323, 1329 (N.D. Ill. 1992). Beyond this, none of the district court opinions petitioners cite *rejects* use of voting age, although, to be sure, they use total population.

This Court recently and pointedly noticed that courts, in determining whether a Voting Rights Act violation has occurred, have looked to voting age population, and further noticed that the Court itself had repeatedly referred to the voting population in its own opinion in *Gingles*. *Growe v. Emison*, 507 U.S. __, 122 L.Ed.2d 388, 403 n.4., 113 S. Ct. 1075 (1993). The most recent cases - the case at bar and *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 836 F.Supp. 453, 463 (W.D. Tenn. 1993) - recognize voting age population as the superior measure, and it is. It is the superior measure because it is the measure more directly related to the language of section 2 itself, which language prohibits that which results in the denial or abridgement of the *right to vote*, see 42 U.S.C. §1973(a), a right possessed by *voters*.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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